United Malayan Banking Corp Bhd v Tan Kay Hock

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-03-5 OF 1994
ZAKARIA YATIM, MAHADEV SHANKAR AND VC GEORGE JJCA
26 MAY 1997

Civil Procedure *— Pleadings — Striking out defence — Appeal against refusal of registrar to strike out statement of defence — Action to recover moneys lent and interest — Statement of claim was inconsistent with letters of demand and certificate of indebtedness — Whether registrar was correct in dismissing application to strike out defence — Rules of the High Court 1980 O 18 r 19*

The appellant ('the bank') filed a claim in the High Court to recover moneys lent to the first defendant from five separate loan transactions under three accounts. The bank claimed that these loans were secured by two guarantees executed by the second and third defendants. After the suit was filed, the bank pursued the third defendant ('Tan') alone. The bank sent out demand letters for payment of six loans. The first was for an outstanding overdraft for RM2,031,706.14 and the remaining were the five loans totalling RM6,384,771.82. The amount of RM6,384,771.82 was different from what is set out in the demand letters. The bank's branch manager at Teluk Intan signed a certificate of indebtedness that the first defendant owed the bank RM4,552,406.81 which did not tally with the amounts in the statement of claim. Tan's solicitors request for the documentation to support the five transactions listed in the statement of claim was refused by the bank. Tan subsequently filed a defence. The bank applied to have the defence struck out under O 18 r 19 of the Rules of the High Court 1980. The registrar and, on appeal, the judge, dismissed the application. Hence, the bank appealed to the Court of Appeal.

Held, dismissing the appeal:

The five transactions set out in the amended statement of claim were for amounts which were different from those set out in the demand letters. It was not apparent which of these transactions related to which accounts set out in the statement of claim. Further, the Teluk Intan certificate of indebtedness did not relate the account numbers of the loans to what was stated in the demand letters and the rates of interest varied from what was set out in the statement of claim. To be conclusive, the certificate had to be consistent with the statement of claim. It was not. The amended statement of claim also clearly gave the impression that one advance each was made under each of the guarantees whereas all the other material put forward by the bank had indicated otherwise. Therefore, it cannot be said that there was no reasonable defence in light of all the infirmities in the statement of claim. In this case, the registrar had stated all the relevant principles and was exercising a judicial discretion when she dismissed the bank's application to strike out (see pp 816A–B, G–H and 817B–C, H).

[**Bahasa Malaysia summary**

Perayu ('bank tersebut') memfailkan suatu tuntutan di Mahkamah Tinggi bagi mendapat balik wang yang dipinjam kepada defendan pertama daripada lima transaksi pinjaman berasingan di bawah tiga akaun. Bank tersebut menuntut bahawa pinjaman ini telah dijamin oleh dua gerenti yang dilaksanakan oleh defendan kedua dan ketiga. Selepas guaman difailkan, bank tersebut meneruskan tindakan terhadap defendan ketiga ('Tan') sendiri. Bank tersebut menghantar surat tuntutan untuk bayaran enam pinjaman. Yang pertama adalah untuk overdraf yang belum dijelaskan sebanyak RM2,031,706.14 dan bakinya adalah lima pinjaman berjumlah RM6,384,771.82. Amaun sebanyak RM6,384,771.82 adalah berbeza daripada apa yang dinyatakan dalam surat tuntutan. Pengurus cawangan bank tersebut di Teluk Intan menandatangani perakuan hutang bahawa defendan pertama terhutang jumlah sebanyak RM4,552,406.81 kepada bank tersebut yang tidak selaras dengan amaun dalam pernyataan tuntutan. Permintaan peguamcara Tan untuk dokumen-dokumen bagi menyokong lima transaksi yang disenaraikan dalam pernyataan tuntutan ditolak oleh bank tersebut. Tan kemudiannya memfailkan pembelaan. Bank tersebut memohon supaya pembelaan dibatalkan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Pendaftar, dan atas rayuan, hakim, telah menolak permohonan. Justeru itu, bank tersebut merayu kepada Mahkamah Rayuan.

Diputuskan, menolak rayuan:

Lima transaksi yang dinyatakan dalam pernyataan tuntutan terpinda adalah untuk amaun yang berbeza daripada apa yang dinyatakan dalam surat tuntutan. Adalah tidak jelas yang manakah daripada transaksi ini berkaitan dengan mana akaun-akaun yang dinyatakan dalam pernyataan tuntutan. Selanjutnya, perakuan hutang di Teluk Intan tidak memaklumkan nombor akaun pinjaman kepada apa yang dinyatakan dalam surat tuntutan dan kadar faedah berubah daripada apa yang dinyatakan dalam pernyataan tuntutan. Untuk menjadi muktamad, perakuan haruslah konsisten dengan pernyataan tuntutan. Bukanlah demikian di sini. Pernyataan tuntutan terpinda dengan jelasnya juga memberikan gambaran bahawa satu pendahuluan masing-masing dibuat di bawah setiap gerenti manakala segala material lain yang dibentangkan oleh bank tersebut telah menunjukkan sebaliknya. Oleh itu, ia tidak boleh dikatakan bahawa tiada terdapat pembelaan munasabah memandangkan semua kelemahan dalam pernyataan tuntutan. Dalam kes ini, pendaftar telah menyatakan segala prinsip yang relevan dan melaksanakan budi bicara kehakiman sewaktu beliau menolak permohonan bank tersebut untuk pembatalan (lihat ms 816A–B, G–H dan 817B–C, H).]

Notes

For cases on striking out of defence, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2683–2702.

Case referred to

United Malayan Banking Corp Bhd v Pembinaan KSY Bhd & Ors [1993] 3 MLJ 45

Legislation referred to

Rules of the High Court 1980 O 14, O 18 r 19

Appeal from: Civil Suit No C23–1917 of 1986 (High Court, Kuala Lumpur)

Manjit Singh (*Deborah Kaur* with him) (*Adnan Sundra & Low*) for the appellant.

RR Sethu (*Law Mei Lin* with him) (*PM Tan Chan & Partners*) for the respondent.

Mahadev Shankar JCA (delivering the judgment of the court): We unanimously dismissed this appeal with costs immediately upon the conclusion of the counsel's submissions. Although VC George JCA retired after the notice of appeal was filed, the reasons of the court now follow.

The appellant ('the bank') filed this claim in the High Court to recover moneys lent to the first defendant by its head office at Kuala Lumpur (through an account No 7478) by way of an overdraft, and by way of a letter of guarantee, and also to recover moneys lent by its Teluk Intan office (through an account No 2383) by way of an overdraft and by way of a fixed loan, and through account No 3222 by way of an overdraft. In other words, there were three accounts under which there were five separate loan transactions.

The bank claimed that these loans were secured by two guarantees executed by the second and third defendants. After the suit was filed, the bank pursued the third defendant ('Tan') alone. He filed a defence. The bank filed a summons in chambers to the registrar to have the defence struck out under O 18 r 19 of the Rules of High Court 1980. The registrar dismissed the application. The bank appealed to the judge. She dismissed the appeal. The bank then appealed to us.

Tan executed a guarantee to the bank on 21 March 1980 ('the first guarantee'). The opening words of the first guarantee read as follows:

> In consideration of your agreeing at my/our (joint and several) request to continue/open *an* account current with and to give credit to Sabak Bernam Oil Mill (1975) Sdn Bhd (hereinafter called 'the customer(s)'), I/We hereby (jointly and severally) agree to guarantee and/or indemnify you as follows ... . (Emphasis added.)

We have emphasized 'an' because the particular account to which this guarantee refers was not identified in this document or in the statement of claim. This first guarantee was limited to RM5.3m with interest at 11% pa variable at the bank's discretion upon the bank giving prior notice.

On another date which is not stated, Tan executed a second guarantee ('the second guarantee'). Both the interest chargeable and the date of this instrument have been left blank. It was limited to RM133,740. In all other respects, it was identical in terms to the first guarantee. Once again, the account to which this guarantee related was not identified either in the document or the statement of claim.

On 8 March 1984, the bank sent out demand letters for payment of six loans. The first was for an outstanding overdraft for RM2,031,706.14 with interest at 13% pa on the first RM1.5m and 14% pa on the balance.

The other five loans were due on various bills of exchanges. Interest at 14% pa was charged on these loans.

The five transactions set out in the amended statement of claim totalling RM6,384,771.82 are for amounts which are different from those set out in the demand letters. It is not apparent which of the six transactions in the demand letters transactions relate to which accounts set out in the statement of claim. In the prayer to the statement of claim, a flat rate of 14% pa by way of interest is claimed from 31 December 1985 until judgment. No details are given in the statement of claim as to how the bank became entitled to recover such rates of interest from Tan.

The guarantees contained a conclusive evidence clause. On 17 September 1990, the bank's branch manager at Teluk Intan signed a certificate of indebtedness that, as at 15 September 1990, the first defendant owed the bank $4,552,406.81 with further interest at 10% pa from 16 September 1990 until full settlement. Even if the '$' sign could be taken to mean 'RM', this figure does not tally with the amounts in the statement of claim.

On 6 October 1990, the bank's Kuala Lumpur manager certified that:

> Sabak Oil Sdn Bhd is indebted to the United Malayan Banking Corp Bhd in the sum of $3,771,344.06 as at 15 September 1990 being in respect of overdraft facility together with further interest thereon at the rate of 10% pa from 16 September 1990 until date of full settlement and the sum of $1,059,756.23 as at 15 September 1990 being in respect of bank guarantee facility together with further interest thereon at 14% pa from 16 September 1990 until date of full settlement.
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> I, further certify that Tan Kay Hock, being the guarantor of the abovenamed Sabak Oil Sdn Bhd, is indebted to the United Malayan Banking Corp Bhd in the sum of $3,771,344.06 as at 15 September 1990 being in respect of overdraft facility together with further interest thereon at the rate of 10% pa from 16 September 1990 until date of full settlement and the sum of $1,059,756.23 as at 15 September 1990 being in respect of bank guarantee facility together with further interest thereon at 14% pa from 16 September 1990 until date of full settlement.

The Teluk Intan certificate made no reference to Tan. The certificates do not relate the account numbers of these loans to what is stated in the demand letters and the rates of interest vary from what is set out in the statement of claim. Besides, taken together, the total as at 15 September 1990 is RM8,323,750.87. To be conclusive, these certificates, at the very least, had to be consistent with the statement of claim. They were not.

These discrepancies were the subject of correspondence between the respective solicitors of Tan and the bank when Tan's solicitors asked for the documentation to support the five transactions listed in the statement of claim. The bank's solicitors declined to supply the particulars requested.

Paragraphs 5 and 6 of the amended statement of claim read as follows:

> 5 By a contract in writing dated 10 March 1980 (the first guarantee), in consideration of the plaintiffs making *an advance* to the first defendant, the second and third defendants covenanted with the plaintiffs to guarantee the due payment of the same up to the sum of RM5.3m together with interest at the rate of 11% pa, commission, banking

charges and costs including the cost incurred by the plaintiffs in enforcing or seeking to obtain payment of the money thereby guaranteed.

6 By a further contract in writing dated 17 April 1980 (the second guarantee), in consideration of the plaintiffs making *an advance* to the first defendant, the second and third defendants covenanted with the plaintiffs to guarantee the due payment of the same up to the limit of RM133,740 together with interest at the usual rate or rates of the plaintiffs. (Emphasis added.)

These paragraphs clearly leave the court with the impression that one advance each was made under each of the guarantees whereas all the other material put forward by the bank indicates otherwise.

For the guidance of practitioners, and with respect to the bank's solicitors, we wish to confirm and highlight the submission of En Sethu who appeared as Tan's counsel in this appeal. Applications to strike out under O 18 r 19 of the Rules of the High Court 1980 and applications for summary judgment under O 14 call for very different approaches in judicial evaluation. See *United Malayan Banking Corp Bhd v Pembinaan KSY Bhd & Ors* [1993] 3 MLJ 45 at pp 49 and 50, where Mohamed Dzaiddin SCJ said:

> The approach to be taken by an appellate court in an O 14 appeal has been settled. The appellate court should not regard the appeal as reviewing the exercise of the judge's discretion but should approach the appeal as a rehearing. This principle was accepted by this court in *Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164, following *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183, *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 and *European Asian Bank AG v Punjab & Sind Bank (No 2)* [1983] 1 WLR 643; [1983] 2 All ER 508.
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> In the present appeal, since the triable issues, as found by the learned judge, arose as matter of evidence, following the above principles, it would be wrong for this court to interfere with the learned judge's discretion. Furthermore, upon considering the issues raised in the amended defence, we find ourselves in complete agreement with the conclusions of the learned judge. Accordingly, we hold that this is not an appropriate case for summary judgment.

The learned registrar was exercising a judicial discretion when she dismissed the bank's application to strike out. With respect, we feel that Pn Rahmah Hussain covered the ground admirably in her judgment with which we entirely agree. All the relevant principles have been stated there. This defence can be criticized as being somewhat artfully worded but the bank's solicitors' refusal to supply the documents requested could have contributed to that situation. What cannot be said is that there is no reasonable defence in the light of all the infirmities of the statement of claim which we have spelt out.

Appeal dismissed.

Reported by David Lai